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In the Supreme Court of the United States

OCTOBER TERM, 1974

EARL R. FOSTER, PETITIONER

v.

DRAVO CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A–18A) is reported at 490 F. 2d 55. The opinion and order of the district court (Pet. App. C, pp. 20A–21A) are not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 19A) was entered on December 26, 1973. The time for filing a petition for a writ of certiorari was extended by Mr. Justice Brennan to May 25, 1974. The petition was filed on that day and was granted on October 15, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether vacation benefits based on the performance of certain minimum work requirements for the employer during the preceding year are perquisites of seniority to which a returning veteran is entitled under Section 9 of the Military Selective Service Act, as amended, 50 U.S.C. App. 459; and, if not, whether the veteran is in any event entitled under the Act to a *pro rata* vacation benefit based on his work for the employer before and after his military service for which vacation benefits would not otherwise be received from the employer.

STATUTORY AND COLLECTIVE BARGAINING AGREEMENT PROVISIONS INVOLVED

Section 9 of the Military Selective Service Act, 62 Stat. 614, as amended, 50 U.S.C. App. 459, provides in relevant part:

* * * * *

(b) *Reemployment rights.*

In the case of any such person who, in order to perform such training and service, has left or leaves a position * * * and * * * makes application for reemployment within ninety days after he is relieved from such training and service * * *—

* * * * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer * * * to such position or to a position of like seniority, status, and pay;

* * * * *

(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) * * * shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) * * * should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

* * * * *

The collective bargaining agreement provides in relevant part (A. 50–52):

Article XIV, "Vacations."

Section 1 provides:

Effective December 31, 1966, vacations for eligible employees, as defined in Section 2, will be calculated as of December 31 each year. On the first December 31 of employment he will be given four (4) hours' vacation with pay at

his base hourly rate at the time of taking the vacation for each month in which he worked ten (10) or more days between his hire date and December 31, up to a maximum of forty (40) hours. On the second December 31 of continuous employment he will be given one (1) week and two (2) days vacation of fifty-six (56) hours with pay at his base hourly rate at the time he receives his vacation pay to be taken at such time as the Company shall designate. On the third December 31 of continuous employment, he will be given one (1) week and three (3) days vacation of sixty-four (64) hours with pay at his base hourly rate at the time he receives his vacation pay to be taken at such time as the Company shall designate. On the fourth December 31 of continuous employment he will be given one (1) week and four (4) days vacation of seventy-two (72) hours with pay at his base hourly rate at the time he receives his vacation pay to be taken at such time as the Company shall designate. * * *

Section 2 provides:

In order to qualify for the foregoing vacations, an employee who has been continuously employed for two (2) or more December 31sts and has seniority on the current December 31st must have received earnings in at least twenty-five (25) workweeks in the twelve (12) months immediately preceding the current December 31st. However, employees who are laid off during the year immediately preceding December 31 and because of such layoff do not qualify for a vacation under this Section will be given a pro rata vacation to which they might otherwise be entitled on the relationship of the weeks they did work to twenty-five (25) weeks but in no case more vacation than they would have received under this Section if they had worked twenty-five (25) weeks or more.

For purposes of eligibility for vacations, absence from work due to occupational injury or occupational disease up to twelve (12) months immediately following date of beginning of such absence will be included as time worked in the said immediately preceding twelve (12) months.

"Continuous employment" as used in this Article means continuous seniority since any break in such seniority caused by any of the reasons enumerated in Section 7 of Article X of the Agreement.

STATEMENT

Petitioner, Earl R. Foster, began work as a full-time employee of the respondent, Dravo Corporation, on August 5, 1965. He worked continuously for the company until he entered military service on March 6, 1967. Upon completing his military obligation he was reinstated to his former position with respondent on October 7, 1968, and worked the remaining 13 weeks of that year and steadily thereafter.

Under the applicable collective bargaining agreement, employees of respondent who "have received earnings" during 25 weeks of the preceding calendar year are entitled to paid vacations.[1] Because of his

[1] It was stipulated that petitioner "received all vacation benefits due him for the year 1966 before entering military service on or about March 6, 1967" (App. 9).

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military service petitioner received earnings in only 9 weeks in 1967 (the year on which eligibility for a vacation in 1968 is predicated under the agreement) and 13 weeks in 1968 (on which the 1969 benefits are based) (Pet. App. A, p. 2A). On this ground respondent denied petitioner vacation benefits in both 1968, the year of his return, and 1969, his first complete year after return. By contrast, employees who began work contemporaneously with petitioner and did not go into military service received vacation benefits in both years.[2]

Petitioner filed this suit in the district court alleging that respondent violated Section 9 of the Military Selective Service Act, as amended, 50 U.S.C. App. 459, by refusing to count the time he spent in military service in computing his eligibility for vacation benefits. The district court granted judgment for respondent on the ground that petitioner had failed to satisfy the eligibility requirements for vacation benefits under the collective bargaining agreement in both 1967 and 1968 (Pet. App. C, pp. 20A–21A).

On appeal, the court of appeals noted that there is a conflict among the circuits as to whether vacation benefits are seniority rights protected by the Act or deferred compensation which is unprotected, where the collective bargaining agreement conferring them conditions their receipt upon the completion of a

[2] It was stipulated that petitioner was in "an other than temporary position" and would not have been laid off during his period in the military, and that employees junior to petitioner in seniority, who were not called into military service, received earnings in at least 25 work weeks of each year during the period in which petitioner was in military service (App. 8–10).

specified work period (Pet. App. A, p. 10A). The court understood the Tenth Circuit[3] to have held that a returning veteran who has not satisfied the work requirement under such an agreement is not entitled to vacation benefits, while it understood the Ninth[4] and Seventh[5] Circuits to have held that vacation benefits are seniority benefits to which a returning veteran is entitled under the Act regardless of whether he satisfies the particular eligibility requirements of the agreement (Pet. App. A, pp. 10A–12A).

The court of appeals stated that in its view the question whether a benefit conferred under a collective bargaining agreement is a perquisite of seniority is essentially one of contract interpretation, and controlling weight must be given to the probable understanding of the parties to the agreement. As the court put it, the issue is "whether the employer and the employees, through their representatives, viewed the particular benefit as additional compensation for work performed or a prerogative of seniority" (Pet. App. A, p. 12A).

Accordingly, the court of appeals examined the agreement between respondent and petitioner's union and found that "the language of the contract requiring the employee simply to receive earnings in at

[3] *Kasmeier* v. *Chicago, Rock Island & Pacific R. Co.*, 437 F. 2d 151.

[4] *Locaynia* v. *American Air Lines, Inc.*, 457 F. 2d 1253, certiorari denied, 409 U.S. 982. Recently a panel of the Ninth Circuit distinguished *Locaynia* and adopted an approach similar to the one adopted in *Kasmeier* and by the court below. *Austin* v. *Sears, Roebuck & Co.*, C.A. 9, No. 73–2704, decided October 21, 1974.

[5] *Ewert* v. *Wrought Washer Mfg. Co.*, 477 F. 2d 128.

least twenty-five weeks is arguably ambiguous" (Pet. App. A, p. 14A). But the court believed "it is not realistic to surmise that any employee could work for substantially less than the number of hours customarily regarded as constituting a full work week for any period of time without being discharged" and that "it is questionable that an arbitrator, or a court in the absence of an arbitration provision, would award such employee full vacation benefits under this contract" (*ibid.*).

The court concluded that "the labor contract in this case measures the amount of paid vacation that a worker has earned on a basis different from seniority" (Pet. App. A. p. 16A), a conclusion which was buttressed by the court's belief that the term "seniority" is generally taken to refer to a "priority factor that normally serves to protect workers' long term interest in job security" while vacation benefits are "normally and reasonably considered part of a worker's current or short term return for labor" (Pet. App. A, p. 15A). Therefore the court held that petitioner, who had not received "earnings" in 25 work weeks during either 1967 or 1968, was not entitled to full vacation benefits in either 1968 or 1969. However, the court remanded the case to the district court to consider whether petitioner was entitled under the collective bargaining agreement to a *pro rata* share of vacation benefits based on the weeks he did work in 1967 and 1968, if the district court found that that issue had been properly raised (Pet. App. A. pp. 17A–18A).

SUMMARY OF ARGUMENT

I

When Congress passed the Nation's first peacetime draft law it was concerned that servicemen not be penalized on their return to civilian employment by reason of their absence in the military. It thus provided that they should be restored to a position "of like seniority, status, and pay." 50 U.S.C. App. 459(b). When it re-enacted the statute in 1948, Congress, confirming this Court's decision in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, added that the serviceman's restoration must be with such status "as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration * * *." 50 U.S.C. App. 459(c)(2).

This Court first applied these principles in situations involving traditional seniority benefits such as promotions and rights against discharge. Then, in *Accardi* v. *Pennsylvania R. Co.*, 383 U.S. 225, the Court applied the same rationale to severance pay. Under the contract in *Accardi* the amount of severance pay was based on length of "compensated service," and the company argued that the severance pay was therefore deferred compensation for work performed, rather than a function of seniority. This Court noted, however, that there was no direct correlation under the contract between the amount of time actually worked and the benefit provided. It therefore held that, viewed realistically, the benefit was a perquisite of seniority, protected by the Act. Accordingly, the claimant veterans in *Accardi* were

entitled to have their service time counted for severance pay purposes. In *Eagar* v. *Magma Copper Co.*, 389 U.S. 323, the Court applied *Accardi* to vacation and holiday pay.

In our view *Accardi* and *Eagar* suggest the following principle for the situation where vacation benefits are conditioned by contract on a requirement of prior service: where the benefits are essentially correlated to the amount of actual work performed they are part of compensation and, to the extent the work has not been performed, are not protected by the Act; where they are not so correlated the benefit is based on continuity of employment and is an aspect of status or seniority protected by the Act.

II

The collective bargaining agreement in this case, like the agreement in *Accardi*, shows that the vacation benefits at issue here are not directly tied to time actually worked, but are instead a reward for continuous service. It follows that petitioner, a returning serviceman, was entitled to have his time in military service counted as time in the plant and was therefore entitled to vacation benefits in his year of return and in the next year. He should not have been deprived of paid vacations in both those years while employees equal or junior to him in seniority, but who did not go into the service, received such vacations.

III

If the Court should disagree with our contention that petitioner is entitled to full vacation benefits, he should at a minimum receive *pro rata* benefits for time

actually worked before and after his military service, regardless of whether *pro rata* benefits are authorized by the collective bargaining agreement. Anything less would penalize him because of his absence in military service—contrary to the Act's basic principle that a veteran's rights after his return are to be determined as if he had not been absent.

ARGUMENT

I

VACATION BENEFITS WHICH ACCRUE AFTER A VETERAN'S RETURN TO HIS CIVILIAN EMPLOYMENT AND WHICH ARE NOT MERELY COMPENSATION FOR ACTUAL WORK PERFORMED ARE A PERQUISITE OF SENIORITY TO WHICH RETURNING VETERANS ARE ENTITLED UNDER THE MILITARY SELECTIVE SERVICE ACT

A. THE RIGHTS OF RETURNING VETERANS UNDER THE ACT ARE BASED GENERALLY ON A "MOVING ESCALATOR" PRINCIPLE

When Congress passed the Nation's first peace-time draft law in 1940 (54 Stat. 885), it was concerned that "he who is called to the colors" not be "penalized on his return by reason of his absence from his civilian job."[6] It therefore provided, in what is now 50 U.S.C. App. 459(b), that a returning veteran is entitled to be restored to a position "of like seniority, status, and pay," and, in what is now 50 U.S.C. App. 459(c), that he is entitled to be restored to his former civilian job "without loss of seniority." The same Section also provided that a returning veteran is

[6] *Tilton* v. *Missouri Pacific R. Co.*, 376 U.S. 169, 170–171; *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284.

entitled to "participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence."

The Act thus apparently distinguishes between seniority benefits to which the returning veteran is entitled by statute, and insurance and other benefits which are subject to contract terms for employees on leave of absence.[7] But it provides no definition of either.[8]

In re-enacting the statute in 1948, Congress added that the returning veteran should be restored to his employment

> * * * in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment. [50 U.S.C. App. 459 (c)(2).]

But "status in his employment" is not defined.

[7] In *Accardi* v. *Pennsylvania R. Co.*, 383 U.S. 225, 231–232, this Court noted that the legislative history of the "insurance or other benefits" clause indicates a congressional purpose to entitle "employees to receive, while in service, such benefits as their employers accorded employees on leave of absence." "Without attempting" there "to determine the exact scope of this provision," the Court held "that it was intended to add certain protections to the veteran and not to take away those which are granted him by" the Act's other provisions.

[8] One commentator has noted that "Congress passed the 1940 Selective Service Act in great haste, giving little consideration to the problems of reinstating returning servicemen in private employment." Cox, *The Supreme Court, 1965 Term*, 80 Harv. L. Rev. 91, 148 (1966), commenting on *Accardi* v. *Pennsylvania R. Co.*, 383 U.S. 225. See also Haggard, *Veterans' Reemployment Rights and the "Escalator Principle,"* 51 Bost. U. L. Rev. 539 (1971).

This Court first interpreted the Act in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275. It there had to decide (prior to the Act's 1948 amendment) whether a returning veteran, objecting to being "laid-off" after reinstatement, was entitled to assert not only the seniority he had at the time he went into military service but also the additional seniority he would have earned had he remained in continuous employment with the employer.[9] Noting that the Act "is to be liberally construed for the benefit of those who left private life to serve their country * * *" (*id.* at 285), the Court decided the seniority issue in favor of the veteran.

The holding in *Fishgold* established that, at least as to seniority, service in the armed forces is counted as service in the plant. This principle, which has become known as the "moving escalator principle," was explained by the Court as follows (*id.* at 284–285; emphasis supplied):

> Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. * * * He acquires not only the same seniority he had; *his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence.*

The Court subsequently applied this moving escalator principle to other perquisites of seniority, such as promotions and accompanying pay increases. *Mc-*

[9] The Court rejected a contention that he could not be laid off at all.

Kinney v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265; *Tilton* v. *Missouri Pacific R. Co.*, 376 U.S. 169.[10] In these cases, the Court refined the escalator principle, in the promotion context, to distinguish between promotions that depended on the employer's discretionary choice and those which were reasonably certain to occur with normal performance. In *Tilton*, the Court held that a returning veteran, once he has completed required training, is entitled to a promotion of the latter type, with seniority in the new job as of the time he would have completed the requisite work requirements but for his period of military service (and notwithstanding the seniority date to which he otherwise would be entitled under the collective bargaining agreement). Thus, for purposes of seniority in a job to which a veteran's promotion was delayed by his period of military service, time in the service counts as time in the plant. Otherwise, on returning to his civilian employment, the veteran would have fallen behind his workmates who had not left and had moved up the promotion escalator.

B. UNDER THIS COURT'S DECISIONS, THE "MOVING ESCALATOR" PRINCIPLE APPLIES TO FRINGE BENEFITS, INCLUDING VACATION BENEFITS, WHICH ARE BASED ON CONTINUITY IN THE EMPLOYMENT RELATIONSHIP AND WHICH ARE NOT MERELY COMPENSATION FOR ACTUAL WORK PERFORMED

While the time-in-service equals time-in-plant rule thus became firmly established for purposes of tradi-

[10] The Court stated in both these cases that the language added by Congress in the Act's 1948 re-enactment (*supra*, p. 12) constituted a congressional ratification of the escalator principle. *McKinney*, *supra*, 357 U.S. at 271; *Tilton*, *supra*, 376 U.S. at 175.

tional seniority rights, questions remained as to its application to "fringe benefits," such as severance pay, holiday pay and vacation pay, which are part of the consideration bargained for in contract negotiations rather than merely a definition of relative positions between employees. Since the Act specifies that the period of military service shall be treated as a "furlough or leave of absence" from the serviceman's civilian job (50 U.S.C. App. 459(c)), it was clear that a veteran, on returning to his civilian job, would not receive back pay for his time in military service or payment for fringe benefits missed during that period, except to the extent that his employment contract might provide for such payment to employees on leave. But once he had returned, to what extent did the Act require that he be given credit for his period of military service in determining the measure and availability of fringe benefits receivable after his return?

The problem was first presented to this Court in *Accardi* v. *Pennsylvania R. Co.*, 383 U.S. 225, in which the Court unanimously held that the Act required that the veterans there involved be given credit for their time in military service in computing their severance pay. In *Accardi*, an agreement between several railroads and a tugboat firemen's union abolished the position of fireman on diesel tugs and provided that firemen who lost their jobs were to be paid a separation allowance based on the length of "compensated service" with the railroads. Under the agreement, "[a] month of 'compensated service' was defined as any month in which the employee worked one or more

days and 'a year of compensated service is 12 such months or major portion thereof.'" 383 U.S. at 228. The question was whether time in military service was to be included in computing the severance pay for veterans who had been reinstated in firemen's jobs with rights under the Act. In rejecting the railroad's contention that the severance pay was merely deferred compensation for time worked and not a perquisite of seniority protected by the Act, the Court held that the benefits guaranteed by the Act are not only the "traditional" seniority benefits, "such as work preference and order of lay-off and recall," but all benefits which automatically accrue to employees with continued employment. 383 U.S. at 229–230. As the Court explained: "The term 'seniority' is not to be limited by a narrow, technical definition but must be given a meaning that is consonant with the intention of Congress" which was "to preserve for the returning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country." *Ibid.*

In holding that the severance pay at issue in *Accardi* was not merely compensation for actual work performed, the Court noted that the contract conditioned the benefits only on the performance of work for "one or more days" per month during a majority of the 12 months of the year. It was thus "possible under the agreement for an employee to receive credit for a whole year of 'compensated service' by working a mere seven days," since there was "no distinction whatever between the man who worked one day a

month for seven months and the man who worked 365 days in a year." 383 U.S. at 230. Accordingly, the Court concluded, "the amounts of the severance payments were based primarily on the employees' length of service with the railroad"—the "real nature" of these payments was that they were perquisites of seniority. *Ibid.*

Significantly, the Court in *Accardi* did not attempt to reconstruct the agreement by speculating about whether an employee who worked only seven days in the year would have been fired (compare Pet. App. A, pp. 14a–17a). Rather, because the benefit was not correlated with actual work performed and therefore was not merely deferred compensation, the Court concluded that it was essentially a function of the length of the continuing employment relationship and therefore within the moving escalator principle of the Act's protection of all "the perquisites and benefits that flow from" seniority. 383 U.S. at 230.

While *Accardi* concerned severance pay, the Court soon had occasion to rule on similar issues regarding holiday pay and vacation benefits. Approximately one month prior to this Court's decision in *Accardi,* the Ninth Circuit had ruled in *Magma Copper Co.* v. *Eagar,* 370 F. 2d 318, that the vacation and holiday pay claimed by the veterans in that case were not attributes of status or seniority protected by the Act, but were "fringe benefits" governed (under the Act's "other benefits" clause) by the provisions of the collective bargaining agreement relating to employees on leave. The agreement in *Eagar* provided paid vacations for employees who had worked 75 percent of the

available shifts in their previous employment year (12 months commencing at date of employment) and who were on the payroll on the last day of that year. It also provided holiday pay for employees who worked the day before and after the holiday and who were on the payroll for three continuous months prior to the holiday. The veterans in that case, having gone into the service before the last day of the employment year, had not met the last day requirement for vacation pay (although they had worked the required 75 percent of the shifts in that year) and, having recently returned to work, had not been on the payroll continuously for the three months prior to the holidays in question.[11] The court of appeals therefore denied their claims for failure to meet the contractual requirements. 380 F. 2d at 319.

After *Accardi* was decided, the Ninth Circuit, in denying a petition for rehearing, purported to distinguish *Accardi* as not involving a "fringe benefit." 380 F. 2d 321–322. One judge dissented on the ground that *Eagar*, like *Accardi*, involved benefits which "'would have automatically accrued to [the veterans] had they remained in their civilian jobs' instead of entering the military service." *Id.* at 322.

This Court granted certiorari and summarily reversed on the authority of *Accardi*. *Eagar* v. *Magma Copper Co.*, 389 U.S. 323. Three dissenting Justices would have held that the length of the vacation and

[11] The facts stated are those relating to claimant Eagar and agreed by the parties in this Court to be representative of the other claims as well. See *Eagar* v. *Magma Copper Co.*, 389 U.S. 323, n. 1 (dissenting opinion).

the amount of vacation and holiday pay were functions of seniority protected by the Act, but that *entitlement* to a vacation or paid holiday was an "other benefit" governed by the contract. *Id.* at 323–326. But the Court did not accept this position, as to either vacation benefits or holiday pay.[12]

In our view, this Court's interpretations of the Act from *Fishgold* through *Accardi* and *Eagar* suggest a workable principle for the situation where vacation benefits are conditioned by contract on a requirement of prior service. Where the benefits to which the employee is entitled are essentially correlated to the amount of actual work performed,[13] the benefits are

[12] Since the contractual requirement of having worked 75 percent of the shifts in the preceding year of employment had been satisfied by the "representative" claimant in *Eagar* (see n. 11, *supra*), it is possible to interpret this Court's decision in that case as involving only a "veteran who had met the work requirements [and therefore] would have been eligible for the [vacation and holiday pay] benefits if he had simply been on the company's payroll at the relevant times whether he had been working or not." *Palmarozzo* v. *Coca-Cola Bottling Co.*, 490 F. 2d 586, 595 (C.A. 2) (dissenting opinion), certiorari denied, June 10, 1974, No. 73–1369. The court of appeals opinion in *Eagar*, however, left some doubt about whether all the claimants had met the 75 percent requirement, see 380 F. 2d at 322 (dissenting opinion), and this point was not clarified in the papers filed in this Court in the case. (There was no opinion in the district court.) Since this Court reversed the judgment (as to all claimants) without opinion, it cannot be known whether its decision on the vacation issue was so narrowly based.

[13] An example would be either a Pooled or a Ratio-to-Work Plan. Under both, there is often "a direct correlation between the time an employee works and the total vacation payment" ("Paid Vacation and Holiday Provisions," Bulletin No. 1425–9, U.S. Dept. of Labor, Bureau of Labor Statistics, June 1969, p. 18) and "a flat cents-per-hour contribution [is] credited to the individual worker's account." *Id.* at 14.

merely part of the compensation for performance of that work and, to the extent the work has not been performed (see point III, *infra*), are not protected by the Act. But where the benefits are not so correlated, and the contractual requirement of prior service therefore amounts to a granting of benefits on a basis of continuity of the employment relationship rather than merely as compensation for actual work performed, the benefits are an aspect of "status" (or perquisite of "seniority") protected by the Act's escalator principle (the basic effect of which is to preserve continuity of the employment relationship during the period of military service, for purposes of whatever benefits thereafter flow from the preservation of that status).[11] Thus, as we understand the Act and this Court's interpretations of it, veterans who have returned to their civilian jobs are entitled to the same vacation benefits enjoyed by their fellow workers who remained on the job, except in the particular contractual circumstances where it is clear to all that vacation benefits are nothing more than compensation for actual work performed and that denying or diminishing them for the veteran therefore would in no way discriminate against him because of the interruption in the continuity of his employment relationship.

[11] See, *e.g.*, *Polmarozzo* v. *Coca-Cola Bottling Co.*, *supra*, 490 F. 2d at 591, n. 4 (holding that a severance pay eligibility requirement which did not include credit for overtime or for regular time in excess of 1600 hours per year "show[s] that this is a plan rewarding a continuous relationship with the company, rather than giving compensation for work actually performed"). See, also, *Evett* v. *Wrought Washer Mfg. Co.*, *supra*, 477 F. 2d at 128, 129.

II

THE COLLECTIVE BARGAINING AGREEMENT IN THE PRESENT CASE SHOWS THAT THE VACATION BENEFITS AT ISSUE REFLECT CONTINUITY IN EMPLOYMENT STATUS, RATHER THAN MERELY COMPENSATION FOR ACTUAL WORK PERFORMED, AND THAT THEY ARE THUS A PERQUISITE OF SENIORITY TO WHICH PETITIONER IS ENTITLED

The collective bargaining agreement applicable in this case provides (A. 52):

> In order to qualify for the foregoing vacations, an employee * * * must have received earnings in at least twenty-five (25) workweeks in at least twelve (12) months immediately preceding the current December 31st.

Thus the agreement conditions the grant of vacation benefits upon the receipt of "earnings" in at least 25 work weeks during the immediately preceding calendar year. The agreement does not specify a minimum amount of "earnings" which must be received per week, so that it is possible for an employee who earned only one hour's wages in a given week to have that week included as one of the 25 qualifying work weeks. A minimum of 25 hours of work (one hour per week for 25 weeks) could, under this agreement, qualify an employee for exactly the same vacation benefits as would be received by an employee who worked 2000 hours (50 weeks times 40 hours) during the same year.

This lack of correlation between actual hours worked and qualification for vacation benefits, indeed the "bizarre results possible" under this agreement (as in

Accardi, supra, 383 U.S. at 230), demonstrate that the vacation benefits here are not merely deferred compensation. Viewed realistically, the "earnings" requirement is a device for ascertaining those employees who have been continuously employed by respondent. The vacation benefits here, in effect, accrue automatically with length of continuous service; they are thus a particularly clear example of a perquisite of seniority to which petitioner, a returning veteran, is entitled under the Act.

Nor was this conclusion properly avoided by the court of appeals' speculation (see p. 8, *supra*) that an employee who satisfied the 25 weeks' "earnings" requirement by the extreme example of working a mere one hour per week or who otherwise worked "substantially less than the number of hours customarily regarded as constituting a full work week" would have been discharged. This Court in *Accardi* engaged in no such speculation about whether the employer there would have discharged an employee who satisfied the year of "compensated service" requirement in that case by working a mere one day per month for seven months. In each case what is important is that the benefits conferred do not depend essentially on the amount of work performed, and that the service requirement therefore is a method of rewarding continuity in the employment relationship rather than of ascertaining compensation to be awarded for actual work performed.

The court of appeals therefore erred, in our view, in undertaking a speculative inquiry which placed it

in a role comparable to that of a labor arbitrator reforming a contract to reflect what he believes the signatories must have intended. This is a particularly inappropriate approach to cases under this Act because, as the Second Circuit has recognized, "the man in the military is not represented at the bargaining table and * * * any special status accorded veterans is an inconvenience to union and management alike." *Palmarozzo* v. *Coca-Cola Bottling Co., supra,* 490 F. 2d at 592. Instead, we submit, the courts should seek to apply the Act so as to fulfill the legitimate expectations of returning veterans, while avoiding undue niceness of interpretation that would generate further litigation. As the Eighth Circuit has stated, the rights conferred by the Act should "not * * * be eroded by fine factual distinctions. Congress has painted veteran's re-employment benefits with a full brush and not with a narrow stylus." *Morton* v. *Gulf, Mobile and Ohio R. Co.,* 405 F. 2d 415, 419.

And, with particular pertinence to the kind of benefits involved here, the Fifth Circuit has correctly pointed out that in "these times of relatively high wages and steep income taxes, unions bargain vigorously for indirect compensation in the form of a host of diverse benefits. Whether the benefits are elements of 'seniority' or 'other benefits,' the veteran's stake in them must be protected if they would automatically accrue to him but for induction. Clearly, the exclusion of veterans from benefits that have come to be regarded as essential perquisites of employment

is inconsistent with the [Act]." *Hollman* v. *Pratt & Whitney Aircraft*, 435 F. 2d 983, 989.[15]

III

PETITIONER IS STATUTORILY ENTITLED, AT THE VERY LEAST, TO PRO RATA VACATION BENEFITS BASED ON HIS ACTUAL WORK FOR THE EMPLOYER BEFORE AND AFTER HIS MILITARY SERVICE

Should the Court disagree with our contention in points I and II, *supra*, that petitioner is entitled to credit for his military service in determining his eligibility for paid vacations after his return to his civilian employment, we submit that his right under the Act to *pro rata* vacation benefits based on his 9 weeks of work for the company in 1967 and 13 weeks in 1968

[15] Under the principle that time in military service counts as time in the plant, a returning veteran is entitled to vacation benefits even if he returns late in the work year. In order to receive the benefits of the Act, the veteran must report to work within 90 days after his discharge; he thus can neither manipulate nor choose the season in which he returns to work. Nor is a different result warranted by the court of appeals' concern that full vacation benefits for a returning veteran might constitute something of a windfall, in light of the military leave presumably received during his period of military service. It is unrealistic to equate military leave, in the varying contexts and situations in which it arises, with vacations from civilian employment. As this Court recently stated in a different context in *Johnson* v. *Robison*, 415 U.S. 361, 379:

"Military veterans suffer a far greater loss of personal freedom [than those who remain in civilian employment] during their service careers. Uprooted from civilian life, the military veteran becomes part of the military establishment, subject to its discipline and potentially hazardous duty. Congress was acutely aware of the peculiar disabilities caused by military service, in consequence of which military servicemen have a special need for readjustment benefits."

should not depend, as the court below held, on whether *pro rata* benefits are available under the collective bargaining agreement to employees on leave.

As already noted, the basic principle underlying Section 9 of the Act is that "he who is 'called to the colors [is] not to be penalized on his return by reason of his absence from his civilian job'" (*Tilton* v. *Missouri Pacific R. Co.*, *supra*, 376 U.S. at 171). Here, the 9 weeks petitioner worked in 1967 would have entitled him to 9/25 of the normal vacation benefit in 1968 had he remained on the job in 1967 instead of entering military service, and the 13 weeks he worked upon his return in 1968 similarly would have entitled him to 13/25 vacation benefit in 1969. To deny him even a *pro rata* share of vacation benefits based on these partial fulfillments of the contractual requirement (and thus to leave him without any vacation benefits for one year and thirteen weeks after his return to his civilian job) would penalize petitioner because of his absence in military service,[16] and this the Act forbids. This conclusion, we submit, would be unmistakably clear in the absence of the Act's "other benefits" clause, which appears to make certain of the rights conferred dependent on how the contract treats employees on leave. But, as previously noted (*supra*, p. 12, n. 7), this Court expressly held in *Accardi* that the "other benefits" clause was not intended to take away the rights granted elsewhere in the

[16] Indeed, petitioner would not even be treated as well as a new employee, who is entitled under the contract to a vacation in the year he first starts working on the basis of "(4) hours' vacation with pay * * * for each month in which he worked ten (10) or more days between his hire date and December 31 * * *" (A. 50).

Act—and it certainly should not be the basis for abrogating the Act's basic principle, reaffirmed in the 1948 amendment, that a veteran's rights after his return are to be determined as if he had not been absent during his period of military service.

Accordingly, it is our view that, even in the narrow circumstances where vacation benefits are merely part of the employee's compensation for actual work performed, the Act entitles a returning veteran to a *pro rata* share of vacation benefits based on his time worked during the qualifying period, regardless of whether that time satisfies the contractual minimum requirement for qualifying and regardless of how the contract treats employees on non-military leaves of absence.[17] It follows, *a fortiori*, that the Act entitles petitioner to no less than a *pro rata* share of vacation benefits, and the judgment of the court below should, at a minimum, be modified accordingly. For the reasons stated in points I and II, *supra*, however, we contend that in the circumstances here petitioner was entitled to full vacation benefits in both 1968 and 1969 and the judgment, accordingly, should be reversed.

[17] It is, of course, settled that no contractual provision purporting to deal specifically with absence for military service can diminish the rights granted by the Act. See *Fishgold*, *supra*, 328 U.S. at 285; *Accardi*, *supra*, 383 U.S. at 229.

CONCLUSION

The judgment of the court of appeals should be reversed, or, in the alternative, modified to require the granting of *pro rata* vacation benefits.

Respectfully submitted.

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